CC Docket Nos. 96-98
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STATEMENT BEFORE
FEDERAL COMMUNICATIONS COMMISSION
PUBLIC FORUM ON COMBINATIONS OF
UNBUNDLED NETWORK ELEMENTS

by

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Good morning. I am honored to be here to participate in this forum on behalf of LCI International Telecom Corp.

Although LCI is extremely pleased that the Commission and its Common Carrier Bureau convened this forum to address what are currently among the most critical and hotly contested issues under the Telecommunications Act, Anne Bingaman, the head of LCI's local services division, was personally disappointed that she could not be here to represent LCI because of a long-planned trip to Japan with her family. Anne asked me to appear in her stead, not because I could ever match her forceful and lively advocacy, but principally because I have devoted a substantial portion of my representation of LCI over the past several months to the very issues that this forum was established to address.

By way of example of LCI's involvement in these issues, we filed a motion in the 271 proceedings in New York requesting, among other things, that before the New York Public Service Commission gave its approval to Bell-Atlantic's 271 application, it should hold hearings to determine the manner in which CLECs would be allowed to combine network elements obtained from Bell Atlantic. Although the Commission ultimately denied our motion, on the same day it did so, it issued an order, as I'm sure you are aware, initiating just such a proceeding. We received Bell Atlantic's first submission in that proceeding last week; the CLECs are scheduled to respond later this month; and a technical conference has been set to commence before Judge Stein on June 29, 1998.

We also filed a similar request in the Texas 271 proceedings, and our arguments on the need for a determination of the most efficient method of combining network elements received favorable comments from Chairman Wood and Commissioner Walsh during the hearings that were held in Austin in April, and more recently in the written comments filed by the Commission rejecting Southwestern Bell's 271 application.

LCI has been actively pursuing these issues in state 271 proceedings for two reasons:

- First, providing competitive local exchange and exchange access services over combined network elements -- the "UNE platform" as it has become known in the industry -- has been a key component of LCI's business plan since the formation of its local services division. LCI strongly believes that combined UNEs are the only way in which it will be able to provide competitive local service to its existing long distance customer base, which is comprised primarily of residential and small business customers. And, prior to the Eighth Circuit's decision in *Iowa Utilities Board*, LCI was actively engaged with two incumbent LECs in the first steps of implementing this important aspect of its business plan.

- Second, in the wake of the Eighth Circuit's decision, the incumbent LECs have erected an insurmountable roadblock to any competition from CLECs that seek to provide local exchange and exchange access services over combined UNEs. That roadblock, not surprisingly, is the subject of this panel, namely, the ILECs' insistence on physically disconnecting network elements and requiring CLECs to physically combine those elements using collocated facilities.

For the reasons I will discuss in more detail in a moment, the ILECs' requirement that CLECs employ collocation (whether physical, virtual or otherwise) as the means by which to combine UNEs has effectively thwarted competition for three very basic, undeniable reasons: (1) establishing collocated facilities is inefficient, time-consuming and extremely costly; (2) combining elements in collocated facilities creates multiple points of failure not present in the ILECs' network and inevitably will preclude CLECs from providing a quality of service equal to that which can be provided by the ILECs to their customers; and (3) given the manual processes involved in physically combining UNEs, there is a limit to the number of customer conversions that can be accomplished in collocated facilities -- in other words, collocation "gates" CLEC competition. Before I

address these issues in more detail, let me first respond to the legal questions that were raised by the Commission in its agenda for this panel.

COLLOCATION IS NOT THE ONLY METHOD FOR COMBINING NETWORK ELEMENTS AUTHORIZED BY THE STATUTE

The first question on the agenda is, "Is collocation the only method for combining network elements authorized by the statute?" The answer to that question is, "absolutely not."

As we all now know by heart, section 251(c)(3) obligates the incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory." It further obligates the incumbents to provide such access in a manner that allows CLECs to combine UNEs in order to provision competing telecommunications services. Nowhere in this provision did Congress restrict the CLEC's access to UNEs only through collocated facilities; instead, the provision obligates incumbents to provide such access at any "technically feasible point."

In regulations implementing this statutory directive, this Commission has been clear that collocation is not the sole method of access to UNEs. Thus, in section 51.5 (47 C.F.R. § 51.5), the Commission defined "technically feasible" by referencing collocation "and other methods of achieving interconnection or access to unbundled network elements." And, in section 51.321 (47 C.F.R. § 51.321), the Commission specifically determined that technically feasible methods of access to UNEs include, "but are not limited to," physical and virtual collocation at the incumbent's end offices. Neither of these implementing regulations was disturbed by the Eighth Circuit in *Iowa Utilities Board*.

The fact that Congress also obligated the incumbent LECs, in section 251(c)(6), to provide for the collocation of CLEC equipment, does not mean that the incumbents can fully satisfy their section 251 obligations by offering only collocation. Had Congress intended such a limitation, it could have easily achieved that result by specifying collocation as the means of nondiscriminatory access to UNEs in section 251(c)(3). Congress did not do so, and the incumbents should not now be allowed to unilaterally establish the means and methods by which they will be deemed to have satisfied their obligation to provide CLECs with nondiscriminatory access to UNEs in a manner that permits CLECs to combine those UNEs. The CLECs have the right to choose which method of access and combination works best for them, provided that such methods are "technically feasible." Some of these other methods are the subject of the next panel.

COLLOCATION IS NOT CONSISTENT WITH THE EIGHTH CIRCUIT'S HOLDING

The next question posed is, "Is collocation consistent with the Eighth Circuit's holding that a competing provider may provide services entirely through the use of unbundled network elements?" The answer to that question is also, "absolutely not."

The Eighth Circuit unmistakably held that under section 251(c)(3), a CLEC could:

> "achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network. Nothing in this subsection requires a competing carrier to owner control some portion of a telecommunications network before being able to purchase unbundled elements."

120 F.3d at 1814 (emphasis supplied). The ILEC's insistence that CLECs combine elements using collocated facilities is contrary to this holding because it requires CLEs to own or control some portion of a telecommunications network. In addition to

obtaining collocation space in the ILEC central office, CLECs will be required to own or control the pre-wired cross-connection frame equipment and the cables necessary to connect to the ILEC frames at the central office. These facts have already caused several state commissions to conclude that a collocation requirement for combining network elements is contrary to the Eighth Circuit's holding.[1]

COLLOCATION FOR COMBINING UNEs DOES NOT SATISFY THE STATUTE'S NONDISCRIMINATION REQUIREMENT NOR DOES IT PROVIDE CLECs WITH A MEANINGFUL OPPORTUNITY TO COMPETE

The remaining question on the agenda is, "How does a BOC demonstrate that its collocation offering satisfies the statutes nondiscrimination requirement and provides competitors with a meaningful opportunity to compete?" The answer to that question is: "It is inconceivable that a BOC could make such a showing because collocation for combining UNEs is inherently discriminatory and deprives CLECs of an opportunity to compete, particularly for small business and residential customers." As mentioned above, this is so because: (1) collocation is inefficient, time-consuming and costly; (2) combining elements in collocated facilities creates multiple points of failure and a potential for inferior service to CLEC customers; (3) collocation gates CLEC competition. I will now briefly address each of these three topics.

1. Collocation is inefficient, time-consuming and costly.

Just about two months ago now, the Department of Justice was asked by the New York Public Service Commission to comment on certain additional commitments

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1 *See, e.g., In the Matter of the Petition of AT&T Communications of the Mountain States Inc. Pursuant to 46 U.S.C. § 252(b) for Arbitration of Rates, Terms and Conditions of Interconnection with U.S. West Communications, Inc.*, Public Service Commission of the State of Montana, Docket No. D96.11.200, Order on Supplemental Disputed Issues, Order No. 5961d at ¶ 19 (April 21, 1998).

that Bell Atlantic had agreed to make in an effort to obtain the New York Commission's approval of its 271 application. In response to that request, Assistant Attorney General Joel Klein wrote a letter to Chairman O'Mara in which he emphasized that, as long as the Eighth Circuit decision remained the law of the land, the Department believed it was important for state commissions to ensure that incumbents that choose to separate already combined elements "do so in a manner, and permit the most efficient recombination of those elements, so as to minimize the cost that will be imposed on competing carriers that desire access to them."[2] Clearly, collocation does not meet these requirements.

I will not attempt here to discuss specific dollar amounts for collocation costs, because those amounts vary from state to state, and based on my experience in various 271 proceedings, change with some frequency. I will attempt, however, to describe some of the categories of costs that CLECs would be required to pay to combine elements in collocated facilities, which are sufficient in themselves to prove why collocation is such an expensive undertaking:

There are several significant categories of non-recurring costs associated with collocation. These can be grouped as follows:

- Application and Administrative Costs: These would include such things as the incumbent's up-front application fee; engineering for space and equipment to be installed; architectural drawings; and project management costs.

- Site Preparation Costs: These would include such things as end office modification; equipment and power rearrangement; and engineering work associated therewith.

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2 Letter dated April 6, 1998 from Joel I. Klein, Assistant Attorney General of the Department of Justice Antitrust Division to John O'Mara, Chairman of the New York Public Service Commission.

- Cage Construction Costs: These would include the construction of the cage itself — the walls and partitions and floor tiles; HVAC; lighting; electrical panels; and cabling from the power source.

- Equipment Installation and Conductivity Costs: These would include such things as the installation of the CLECs equipment in the collocation cage after it has been constructed and establishing the conductivity of that equipment with the ILEC equipment.

In addition to these non-recurring charges, there are, of course, the monthly recurring charges that the CLECs must pay to the incumbents for the lease of the collocation space, and CLECs will be required to pay the ILECs' labor costs associated with extending the unbundled elements to the collocation facility.

It bears emphasizing that these are the categories of costs for just one collocation facility; when these costs are multiplied by the number of central offices in which a CLEC would have to collocate to service its existing customer base in any given state, it is easy to see why these costs would render the use of combined network elements uneconomic.

In addition to these enormous costs, establishing collocation facilities takes a substantial amount of time. As the Commission is aware from the Bell South-South Carolina 271 application, establishing collocation facilities for just one CLEC in just one central office can take several months; for a CLEC to establish collocated facilities in all of the central offices in a state could take years.

2. Collocation will result in inferior service to CLE customers.

The overwhelming evidence to date demonstrates that collocation for combining elements will likely result in inferior service quality to CLEC customers. This is so for among the following reasons:

- Manual combining of elements at CLEC collocation facilities will likely cause significant customer service interruptions during the interval between the disconnection of the loop and switch by the incumbent, and the subsequent reconnection of these elements at the collocation facility;

- Combining UNEs via collocation will require multiple cross-connections that are not present in the ILECs' circuits, representing additional points of failure; and

- CLECs will not be able to provide digital service to customers who currently receive such service from the ILEC over integrated digital loop carriers; instead, the customers' service will have to be converted to analog loops so that the loops can then be combined at collocation facilities.

3. Collocation "gates" CLEC competition.

Requiring CLECs to combine elements at collocated facilities will delay and substantially restrict competition. As noted above, the process to establish collocated space, assuming space is available, is a lengthy one. Another serious constraint lies in the manual work needed to establish the physical cross-connections that need to be made to combine the elements. This manual process is extremely labor-intensive, requiring a team of at least two or three technicians. This work must be done on a customer-by-customer basis, which limits the numbers of customers that can be provisioned with UNE service in any one day. These limitations will be present whether the collocation is physical, virtual or "cageless;" they will inevitably restrict the ability of CLECs to market their services; and they will effectively preclude the development of any meaningful, robust local competition, particularly competition for residential and small business customers.